IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 22 OF 1989
AND
SECOND APPEAL NO. 23 OF 1989

S.A.No.22/89

Pitambar Sopan Koli.
residing at village
Patwardhan, Kuroli, Taluka:
Pandharpur, Dist. Solapur. ... Appellants.

Versus.

1. Shankar Baba Koli
(since deceased through LRs.)
A) Dhondiba Shankar Koli, Age: 45,
B) Jagannath Shankar Koli,Age: 42,
both residing at Pandharpur,
Dist. Solapur.
C) Chingabai Natha Kore, Age; 47,
residing at Chik Mahud, Taluka:
Sangola, Dist. Solapur.

2. Jagannath Shankar Koli,
residing at village Pirachi-
Kuroli, Taluka Pandharpur,
Dist. Solapur. ... Respondents.

Shri S.M.Railkar for the Appellants.

None for the Respondents.

S.A.No.23/89.

1. Pitamber Sopan Koli,
2. Subhas Sopan Koli,
3. Vilas Sopan Koli.
4. Balibhim Sopan Koli.
All residing at Patwardhan-
Kuroli, Taluka: Pandharpur,
dist. Solapur. ... Appellants.

Versus.

1. Shankar Baba Koli (Mane),
2. Jagannath Shanakr Koli

both residing at Pirachi-
Kuroli, Taluka: Pandharpur,
Dist. Solapur. ... Respondents.

Shri S.M.Railkar for the Appellants.

None for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 3rd February, 2005.

ORAL JUDGMENT.

1. Both the Second Appeals can be conveniently disposed of by a common Judgment. Both the Second Appeals were admitted on 10th January 1989. While admitting the Appeals this Court has observed that the Appeals are admitted on Grounds No.9 and 10 and Ground No.9 respectively. Grounds Nos.9 and 10 of Second Appeal No.22 of 1981 are as under:

(9) The Appellate Court failed to see that as the Appellant's possession as owner since prior to 1956 has been admitted by the brother of the Respondents, the onus is shifted on the Respondents to prove their title and possession within twelve years prior to the suit.

(10) The Appellate Court ought to have seen that if the rightful owner does not assert

his title by process of law within the limitation period, his right forever extinguishes and the possessory owner gets the good title to the property.

Ground No.9 of Second Appeal No.23 reads as under:

(9) The Appellate Court ought to have seen that if the rightful owner does not come forward and assert his title by due process of law, within the limitation period, his right forever extinguishes and the possessory owner gets the good title. In the present case, it ought to have been held that the title of the Respondents has been extinguished.

Though substantial questions of law were not framed specifically at the time of admission of the Second Appeals, it is obvious that this Court felt that the grounds 9 and 10 in Second Appeal No.22 of 1989 and ground 9 of Second Appeal No.23 of 1989 raise substantial questions of law and accordingly I have heard the learned Counsel appearing for the Appellants in both the Appeals on the questions of law incorporated in the said grounds. As copies of Judgment of the Courts below in Second Appeal No.23 of 1989 are destroyed, I have taken on record a compilation

containing the said Judgments tendered by the Advocate for the Appellants.

2. The Appellant in Second Appeal No.22 of 1989 is the Appellant No.1 in Second Appeal No.23 of 1989. The Respondents in both the Appeals are the same. The Appeals arise out of cross suits filed by the parties in respect of the same property. Civil Suit No.46 of 1982 is filed by the Respondents against the Appellants in Second Appeal No.23 of 1989. The subject matter of the suit is Grampanchayat House Nos.49 and 50 situated at Patwardhan Kuroli, Taluka Pandharpur, District Solapur. The case of the Respondents is that the suit property is their ancestral property and the Appellants in Second Appeal No.23 of 1989 have no right, title and interest in the same. The case of the Respondents is that the Appellant No.1 Pitambar was granted permission to stay in the suit premises. Instead of vacating the suit premises, the said Pitambar entered his name in the record of the Grampachayat in respect of the suit premises. He also filed Regular Civil Suit No.317 of 1980 against the Respondents for permanent injunction. The case of the Respondents is that the Appellants in Second Appeal No.23 of 1989 were in unauthorised possession of the suit property. In so far as suit filed by Pitambar is concerned, he has asserted in the plaint that the suit property has been in possession of his ancestors for about 60 years openly and continuously

as owners thereof. In the said suit an allegation is made that the Respondents were trying to dispossess him.

3. The suit filed by the Respondents for possession was contested by the Appellants in Second Appeal No.23 of 1989 by contending that the suit property was in possession of their ancestors for 60 years and they had perfected their title by adverse possession. In the suit filed by Pitambar, the Respondents filed written statement and contended that the possession of the said Pitamber was merely permissive possession and as owners of the suit property, they are entitled to recover possession of the suit property.

4. In so far as the suit filed by the Respondents is concerned, the trial Court dismissed the suit. The suit filed by Pitambar was decreed by the trial Court. The trial Court held that the Pitambar perfected his possession over the suit property by adverse possession. Separate appeals were filed by the Respondents in the District Court. The District Court by separate Judgments allowed the Appeals. The suit filed by Pitambar was dismissed and the suit filed for possession by the Respondents were decreed. The Appellate Court held that the said Pitambar has failed to establish plea of adverse possession and the Respondents have established their ownership. The Second Appeal No.23 of 1989 arises out of the suit filed by the Respondents and

the Second Appeal No.22 of 1989 arises out of the suit filed by the said Pitamber.

5. Shri Railkar the learned Counsel appearing for the Appellants in both the Appeals has invited my attention to the pleadings. He pointed out that the ancestors of Pitambar had perfected their title to the suit property by adverse possession and Pitambar was claiming through them. He submitted that even going by the findings recorded by the Appellate Court, it is crystal clear that the plea of adverse possession was established by the said Pitambar. He submitted that the suit filed by the said Pitambar ought to have been decreed.

6. In so far as the suit filed by the Respondents is concerned, he submitted that as per Article 64 of the Limitation Act, 1963, the suit for possession ought to have been filed within a period of 12 years from the date of dispossession and as the Respondents are out of possession for last about 60 years, the suit was barred by limitation. None appears for the Respondents.

7. I have considered the submissions of Shri Railkar. In Second Appeal No.22 of 1989, the learned Additional District Judge has adverted to the settled principles regarding perfecting of title by adverse possession. After considering the evidence on record, the learned trial Judge held that the Appellant has failed to

establish hostile possession. He held that the entry in the record of rights of the name of Pitambar was made for the first time in 1982 and that by itself cannot be equated with assertion of hostile title. The learned Judge also held that assuming that there was long standing possession of said Pitambar, that by itself was not sufficient to come to the conclusion that the title is perfected by adverse possession. In the Appeal preferred by the Respondents for challenging dismissal of their suit, the learned Additional District Judge set aside the finding of the trial Court that the suit for possession was not within limitation. The learned Additional District Judge held that as the suit filed by the Respondent was for possession on the basis of title, it will be governed by Article 65 of the Limitation Act, 1963.

8. Shri Railkar has invited my attention to the plaint of the suit filed by Pitambar and his deposition. Though there was no specific pleadings regarding perfection of title by adverse possession, there is a vague pleading to that effect in paragraph 4 of the plaint. A perusal of the deposition of said Pitambar shows that he did not admit ownership of the suit property by the Respondents. In fact the case made out by him in the deposition is that the Respondents are not concerned with the suit house. In fact the deposition itself shows that the said Pitambar never asserted

hostile title. All that he stated was that the suit property was in possession of his father for a long time. It is not his case that by any overt act his father also asserted hostile title. He admitted in the cross-examination that his name appeared in the property card for the first time in the year 1980. He examined brother of the Respondent No.1. Apart from deposing regarding long standing possession, the said evidence of the mother of the Respondent No.1 is also not helpful to Pitambar for establishing his hostile title.

9. The suit for perpetual injunction was filed by the said Pitambar on the basis of title. His contention was that he has perfected his title to the suit property by adverse possession. Considering the evidence and the pleadings I find that the Appellate Court was right in holding that the plea of adverse possession is not established by the said Pitambar. Hence he cannot succeed in getting perpetual injunction by mere proof of long standing possession. Once the plea of adverse possession is not established, the case made out by the Respondents regarding permissive possession of Pitambar has to be accepted.

10. In the Appeal arising out a suit for possession by the Respondents, a finding of fact has been recorded by the Appellate Court that the Respondents had established their title. The said finding cannot be upset in favour

of the said Pitambar who has claimed title on the basis of adverse possession. Once the plea of adverse possession is not established by Pitambar, the Respondents must succeed. The suit of the Respondents being on title, under Article 65 of the Limitation Act 1963 limitation will start running from the date on which the possession of the Defendant becomes adverse. Obviously the suit filed by the Respondents was within limitation and therefore, no fault can be found with the Appellate Court, if decree for possession was passed in favour of the Respondents.

11. No substantial question of law arises in the Second Appeals. The Second Appeals are dismissed with no order as to costs.

Judge.